IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL WRIT PETITION NO.2037 OF 2004

Ms Khushi Harkishan Malhotra ...Petitioner
vs.
The State of Maharashtra ...Respondent

WITH
CRIMINAL WRIT PETITION NO. 1710 OF 2005

Ms Khushi Malhotra ...Petitioner
vs.
The State of Maharashtra ...Respondent

Mr.A.M.Saraogi for the Petitioner
Mr.Borulkar,P.P. for State

CORAM: A.S.OKA,J.
DATE : SEPTEMBER 8,2005

ORAL JUDGMENT:

1. The submissions of the Counsel appearing for the parties were heard on the last date and the Judgment was reserved. Today these Petitions are kept for dictation of the Judgment.

2. With a view to appreciate the submissions made by the Counsel appearing for the parties, it will be necessary to refer to the facts of the case. It appears that on receiving specific information, the police raided a room in Hotel 'Holiday Inn' in Mumbai. With the help of the bogus customer, police entered the said room. In the said room, a woman by the name Sarika was found. Certain articles found in the room were seized by the Police. It appears that there were two other ladies found in the room including the Petitioner in

these Petitions. According to the police the Petitioner disclosed that she was working as prostitute. According to the case of the police, earlier the Petitioner was taken in custody in connection with C.R.No.18 of 2004 registered with Khar Police Station in connection with the offence punishable under Sections 4,5,7 (1)(b) of the Immoral Traffic (Prevention) Act, 1956 (hereinafter referred to as the said Act of 1956). It is alleged that the Petitioner was handed over in custody of her relatives on 2nd June 2004 and again on 5th August 2004 she was found in hotel 'Holiday Inn'. The offence was registered under Sections 4,5,7 (1) (b) of the said Act of 1956 against the two accused persons. viz. Mishtakim Ahmed @ Robbin Azim Ahmed Shaikh and Chetan Laxmidas Sohani. The Accused persons were arrested and were produced before the learned Additional Chief Metropolitan Magistrate, 37th Court, Mumbai on 6th August 2004 and the application for remand was moved by the Sub Inspector of social services Branch of Crime Branch, C.I.D., Mumbai. It appears that the Petitioner was also brought before the learned Magistrate. While passing the order on remand application, the learned Additional Chief Metropolitan Magistrate passed an order directing the Petitioner should be kept in Navjeevan Mahila Sudhar Griha at Mumbai and shall be produced before him on 7th August 2004. He directed that the victim girls be examined under Section 15 of the said Act of 1956.

3. It appears that an application was filed on 9th August 2004 by one Advocate Shri Jaiswal on behalf of the Petitioner praying that she may be set free. The said application was rejected by the learned Additional Chief Metropolitan Magistrate by order dated 17th August 2004. It appears that on 13th August 2004 an application was made before the learned Magistrate for grant of time in favour of the Probation Officer for submission of the report. In a separate report dated 13th August 2004 submitted by the Senior Inspector of Police, it was stated that office bearers of Navjeevan Mahila Vastigriha, Mumbai were making enquiry as regards the Petitioner. It appears that on 30th August 2004 an application was made on behalf of the Petitioner praying that she may be released as she has been confined to Protective Home for a period of more than 21 days. By order dated 10th September 2004, the learned Magistrate rejected the said application. An Appeal was preferred before the Sessions Court by the Petitioner for challenging the order of the learned Magistrate. In the said Appeal, an application for bail was filed on behalf of the Petitioner by her Advocate. The said application came to be rejected by order dated 1st October 2004.

4. Writ Petition No.2037 of 2004 was filed by the Petitioner inter alia praying for direction to set aside the order passed by the Sessions Court on 1st October 2004. A prayer was also

made for compensation. The prayer for interim relief was made directing that the Petitioner should be set free. In the said Petition only State of Maharashtra was made party. On 20th October 2004 the learned A.P.P. pointed out to this Court that on 10th October 2004 the Petitioner had escaped from the custody of the Superintendent of the Navjeevan Mahila Vastigriha. When this submission was made, the Counsel appearing for the Petitioner took time to enable him to take instructions. The Petitioner was directed to remain present in the Court on 26th October 2004.

5. On 3rd November 2004 this Court directed that it was necessary to make investigation as to the reasons why the instances of about eight girls having escaped from Navjeevan Mahila Vasatigriha have taken place. This Court directed to the Superintendent of the said institution to remain present in this court. By order dated 24th November 2004, this Court noted that the Superintendent of Navjeevan Mahila Vasatigriha and the Superintendent of Government Special Rehabilitation of Girls (Special home) Deonar, Mumbai submitted a report accepting that large number of inmates have escaped from the custody. The report also indicates that intimation in that behalf was not only given to the concerned police stations but also to the Government agencies. For various reasons the report discloses that it will be difficult to stop such instances. Therefore, this Court issued notice to the

Secretary of Women and Child Welfare Department, Mantralaya, Mumbai. In the subsequent order, this Court noted that in a short span of seven months in the year 2004, about 141 inmates succeeded in escaping from Navjeevan Mahila Vasatigriha. From Special Rehabilitation Centre at Deonar about 94 inmates escaped.

6. There is a detailed report submitted by the Additional Chief Secretary (Services) of the Government of Maharashtra dated 20th June 2005. In the said report steps taken by the Government have been highlighted.The said steps are as under :

1. To build good infrastructure, a Swadhar project is being set up at Deonar. This will fulfil the need of a bigger and airy campus. Also the ancillary units attached to it will provide counselling, recreation, vocational, medical, networking facilities in better manner. The construction is likely to start in September 2005 after finalising the tenders.

2. On the issue of the establishment of the Special Courts, the State Government has sought the views of Hon’ble High Court as to how many Special Courts are needed and the requirement of the additional staff and the additional expenditure therefor.

3. The Proposal to create additional posts including that for the security at Navjeevan Mahila Vastigrah, Chembur is under consideration. However, the required additional staff has been posted to this home on working arrangement by pooling of the staff. Now these two institutions are having exclusive female staff. The department has taken a special care to post the sensitized staff.

4. The instructions have been issued to the concerned authority to get the electricity connection required for water supply.

5. The Revised Maher Scheme has been extended to the residents of Navjeevan Mahila Vastigriha. Under this scheme, an assistance of Rs.250/- per month is granted to these women for the out of pocket expenses.

6. I would further submit to the Hon’ble High Court that the Department of Women and Child Development is in the process of framing rules under Immoral Trafficking Prevention Act, 1956. This will ensure the strict implementation of the Act. The victims of commercial sexual exploitation are often looked

as offenders but the rules will help to change this scenario and take stringent action against those who are responsible for exploiting them."

The report also discloses that there are large number of vacant posts in the said Navjeevan Mahila Vasatigriha. There is one more report dated 13th July 2005 placed on record by the Chief Secretary of the State Government. In the said report, the programme for taking action has been set out. The material particulars in the said report are as under :

Sl.	**Steps to be taken**	**Time proposed**
1.	Creation of additional posts in Navjeevan Mahila Sudhar Griha	one year
2.	Granting approval for appointing private guards	6 months
3.	Setting up Special Courts for trying the cases under the said Act of 1956	6 months
4.	For framing rules under the said Act of 1956	6 to 8 months
5.	For constructing Swadhar Griha,Deonar	1 & 1/2 year

There are Affidavits filed by the Registrar General of this Court setting out the pendency of the cases under the said Act of 1956. The Affidavit discloses that 1265 cases are pending in the Courts of Metropolitan Magistrates in Bombay and about 44 cases are pending in the Sessions Court at Bombay. As stated earlier, now there is a proposal initiated by the State Government to set up a Special Court for the offences under the said Act of 1956.

7. Writ Petition No.1710 of 2005 is filed by the same Petitioner. In the said Petition very serious allegations have been made against the Officers of Navjeevan Mahila Vasatigriha. It is stated that the Incharge of the said Navjeevan Mahila Vasatigriha informed the Petitioner that she has been ordered to be enlarged on bail on payment of Rs.10,000/-. A case is made out that accordingly the Petitioner managed to collect the said amount and paid the said amount to him and was permitted to leave the said Sudhar Griha. A contention is raised that the Petitioner has not escaped and was permitted to leave. A contention raised in this Petition is that the detention of the Petitioner in the said Navjeevan Mahila Vasatigriha was illegal as procedure under the said Act of 1956 is not followed.

8. The learned Counsel for the Petitioner in both the Petitions submitted that there was no order passed by the

Competent Court authorising detention of the Petitioner in the said institution. He pointed out that no specific orders were passed under Sub Sections 3 and 4 of Section 17 of the said Act of 1956. He submitted that the Petitioner was mislead by the Incharge of the said institution and therefore, she believed that she has been enlarged on bail on payment of Rs.10,000/-. He submitted that he is in a position to substantiate the said allegation.

9. The learned P.P. submitted that the allegations which are made in the Writ Petition No.1710 of 2005 are patently false. He relied upon the Affidavit of one Dilip Vana Hivrale who is at present District Welfare and Child Welfare Officer. He was working as the Superintendent of Navjeevan Mahila Vasatigriha at the relevant time. He stated in the Affidavit that he requested 'Prerna', a Non-Government Organization in Mumbai to conduct confidential enquiry on the question of rehabilitation of the Petitioner. The said organization contacted their counter-part at Delhi i.e. 'Prayas' a Non-Government Organization. The report submitted on confidential enquiry reveals that the Petitioner is likely to re-enter into immoral traffic. He stated in the Affidavit that on 25th February 2005 when he was sitting in his office at about 10.00 a.m. three unknown persons entered his office. One of them whipped out knife and assaulted him on his back. He reiterated that the Petitioner escaped from the said Navjeevan Mahila

Vastigriha. The learned A.P.P. fairly conceded that except for the order passed by the learned Magistrate on 6th August 2004 on remand report, no further order has been passed by the learned Magistrate. He candidly stated that it is observed that the learned Metropolitan Magistrates in Mumbai are not following the procedure incorporated under Section 17 of the said Act of 1956 and therefore, necessary directions are required to be issued.

10. With a view to appreciate the submissions, it will be necessary to refer to the relevant provisions of the said Act of 1956.

11. Section 2 contemplates establishment of two institutions by the name ‘corrective institution’ and ‘protective home’. Corrective institution is one where the persons who are in need of correction are detained. Protective home is one where persons who are in need of care and protection are kept. Section 3 to 9 are the penal provisions. Section 10A gives power to the Court to detain the female offender in corrective home in lieu of sentence of imprisonment. Section 15 gives power to Special Police Officer or Trafficking Police Officer to search the premises without warrant when there is a reasonable ground for believing that an offence has been committed or being committed. Section 16 deals with rescuing the persons from brothel. Section 17 is the material

provision for these Petitions which reads thus :

"17. Intermediate custody of (persons) removed under Section 15 or rescued under Section 16 -

(1) When the special police officer removing a person under sub-section (4) of Section 15 or a police officer rescuing a person under sub-section (1) of Section 16, is for any reason unable to produce him/her before the appropriate Magistrate as required by sub-section (5) of section 15, or before the Magistrate issuing the order under sub-section (2) of section 16, he shall forthwith produce him/her before the nearest Magistrate of any class, who shall pass such orders as he deems proper for his/her safe custody until he/she is produced before the appropriate Magistrate, or, as the case may be, the Magistrate issuing the order :

. Provided that no (person) shall be -

. (i) detained in custody under this sub-section for a period exceeding ten days from the date of order under this sub-section; or

. (ii) restored to or placed in the custody of a

person who may exercise a harmful influence over him/her.

(2) When the (person) is produced before the appropriate Magistrate under sub-section (5) of Section 15 or the Magistrate under sub-section (2) of Section 16, he shall, after giving her/him an opportunity of being heard, cause an inquiry to be made as to the correctness of the information received under sub-section (1) of Section 16, the age character and antecedents of the (person) and the suitability of his/her parents, guardian or husband for taking charge of his and the nature of the influence which the conditions in his/her home are likely to have on him/her if he/she is sent home, and, for this purpose, he may direct a Probation Officer appointed under the Probation of Offenders Act, 1958 (XX of 1958), to inquire into the above circumstances and into the personality of the (person) and the prospects of his/her rehabilitation.

(3) The Magistrate may, while an inquiry is made into a case under sub-section (2), pass such orders as he deems proper for the safe custody of the (person) :

. Provided that where a person rescued under Section

16 is a child or minor, it shall be open to the Magistrate to place such child or minor in any institution established or recognised under any Children Act for the time being in force in any State for the safe custody of children:

. Provided further that no (person) shall be kept in custody for this purpose for a period exceeding three weeks from the date of such an order, and no (person) shall be kept in the custody of a person likely to have a harmful influence over him/her.

(4) Where the Magistrate is satisfied, after making an inquiry as required under sub-section (2),-

(a) that the information received is correct; and

(b) that the (person) is in need of care and protection, he may, subject to the provisions of sub-section (5), make an order that such (person) be detained for such period being not less than one year and not more than three years, as may be specified in the order, in a protective home, or in such other custody, as he shall, for reasons to be recorded in writing, consider suitable:

. Provided that such custody shall not be that of a person or body of persons of a religious persuasion different from that of the (person) and that those entrusted with the custody of the (person) including the persons in charge of a protective home may be required to enter into a bond which may, where necessary and feasible contain undertaking based on directions relating to the proper care, guardianship, education, training and medical and psychiatric treatment of the (person) as well as supervision by a person appointed by the Court, which will be in force for a period not exceeding three years.

(5) In discharging his functions under sub-section (2), a Magistrate may summon a panel of five respectable persons, three of whom shall, wherever practicable, be women, to assist him; and, may, for this purpose, keep a list of experienced social welfare workers particularly women social welfare workers, in the field of suppression of immoral traffic in (persons).

(6) An appeal against an order made under sub-section (4) shall lie to the Court of Session whose decision on such appeal shall be final.

Sub Section 1 of the Section 17 of the said Act of 1956 provides that whenever special police officer removes a person under section 15 or a person is removed under section 16, he or she is required to be produced before nearest Magistrate of any class. The said Magistrate is enjoined to pass such order as he deems fit for the safe custody of the woman or the person until the person is produced before the appropriate Magistrate. The said section puts a restriction that detention cannot be allowed for a period exceeding ten days. Sub section 2 provides that appropriate Magistrate shall after giving the person opportunity of being heard cause an enquiry to be made as to correctness of the information received under Section 16 (1), the age, character and antecedents of the person and the suitability of said person's parents, guardian or husband for taking charge of the person. He may direct a Probation Officer to enquire into the above circumstances. Sub Section 3 authorise the Magistrate to pass an order for safe custody of the person pending the enquiry under Sub section 2. Proviso of Sub section 3 lays down that no person shall be kept in custody for the period exceeding three weeks from the date of such order. Sub Section 4 deals with the power of the Magistrate after enquiry is completed under sub section 2. If the learned Magistrate is satisfied that the information is correct and the person is in need of care and protection, he may authorise the detention of such person for

such period being not less than one year and not more than three years in Protective Home or in such other custody. Sub section 5 provides that while discharging function under Sub Section 2 the learned Magistrate may summon five respectable persons, three of whom wherever practicable, be women to assist him. Order under Sub section 4 is made an appealable order by virtue of Sub Section 6.

12. As conceded by the learned A.P.P. only judicial order which is passed in the matter of the Petitioner is dated 6th August 2004. That order is surprisingly passed on remand report seeking police custody remand of the accused. It is not the case of the State that the Petitioner was an accused. The said order dated 6th August 2004 directs that the Petitioner shall be kept in Navjeevan Mahila Vastigriha and she will be produced before any Court on 7th August 2004. There is nothing on record to show that the Petitioner was produced before the Court on or after 7th August 2004. It appears that an application was moved on behalf of the Petitioner for release of the Petitioner. The said application was rejected by an order dated 17th August 2004. Only observation made by the learned Magistrate is that the Petitioner needs protection under the said Act of 1956. It appears that as the Petitioner was under wrong impression that there is order passed under Sub Section 4 of Section 17 of the said Act of 1956, an appeal was preferred to the Sessions

Court. An Application for bail was made in the said Appeal which came to be rejected by order dated 1st October 2004.

13. The sum and substance of the aforesaid discussion is that neither the learned Magistrate nor the learned Sessions Judge applied his mind to provisions of section 17 of the said Act of 1956. While passing the orders for keeping the Petitioner in protective home for a period of one day, there is no order passed by the learned Magistrate for holding enquiry under Sub Section 2 of Section 17 of the said Act of 1956. Even assuming that he ordered enquiry, he could have passed an order detaining the Petitioner only for a period of three weeks. Admittedly, there is no order passed under Sub Section 4 of the Section 17 of the said Act of 1956. Thus, without their being any judicial order, the Petitioner was kept with the said protective home from 6th August 2004 onwards though there was no order passed either under Sub Section 3 or 4 of Section 17 of the said Act of 1956. In any event, the Petitioner could not have been kept in the protective home after 27th August 2004. Thus, the fact that the Petitioner escaped on 10th October 2004 becomes irrelevant. Therefore, I have not adjudicated upon the allegation regarding payment of Rs.10,000/- by the Petitioner. The Petitioner could not have been detained after 27th August 2004 even assuming that there was order passed under Section Sub Section 3 of Section 17 of the said Act of 1956.

14. The impression which one gathers from the orders passed by the learned Magistrate and the learned Sessions Judge is that the Petitioner is an accused. Going by the case of the prosecution, the Petitioner really appear to be a victim. In my view, the learned Magistrate was duty bound to strictly follow the procedure laid down by the provisions of section 17 of the said Act of 1956. The order of the Sessions Court rejecting the Bail Application of the Applicant is dated 1st October 2004. The said order is passed by ignoring that the Petitioner could not have been detained after 27th August 2004. The entire episode shows sad state of affairs. The approach of the Courts below ought to have been very caution considering the fact that the Court was dealing with an vicitm and not accused. The Courts should have shown more sensivity. In fact a mechanical approach has been adopted by the Court.

15. The reports which are submitted by the State Government in Writ Petition No.2037 of 2004 deserve to be accepted. It is expected that the State Government will act on the reports and will establish a Special Court under Section 22A of the said Act of 1956. As more than 1500 cases are pending in the city of Mumbai, establishment of Special Courts is a matter of great necessity and urgency.

16. Hence, Petitions are disposed of by passing the following

order :

i) It is declared that detention of the Petitioner after 27th August 2004 in the Navajeen Mahila Vasatigriha is illegal and therefore, the Petitioner is set at liberty unless the Petitioner is required in connection with any other offence.

ii) The reports submitted by the State Government in Criminal Writ Petition No.2037 of 2004 are accepted.

iii) A copy of this order be forwarded to the Secretary of Law and Judiciary Department of the State Government and learned Chief Metropolitan Magistrate, Mumbai. The learned Chief Metropolitan Magistrate, Mumbai is expected to circulate a copy of the Judgment to all the Magistrates in the city. The learned Chief Metropolitan Magistrate will consider of assigning the cases under the said Act to specified Courts till establishment of the Special Courts. This will facilitate passing of appropriate orders and holding of enquiry as contemplated by Section 17 of the said Act of 1956.

. Parties to act upon an authenticated copy of this order.

JUDGE